NO. 47989-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DUSTIN ALLEN ROSE,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Judge

OPENING BRIEF OF APPELLANT

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2. Ineffective assistance of counsel deprived Mr. Rose of his constitutional due process right to a fair trial.

3. Mr. Rose was deprived of effective assistance of counsel because his trial counsel failed to propose jury instructions for criminal trespass in the first degree.

4. Mr. Rose was deprived of effective assistance of counsel because his trial counsel failed to propose jury instructions for voluntary intoxication.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The United States and Washington Constitutions require the State prove all essential elements of a charged offense. Must Mr. Rose's conviction for attempted residential burglary be reversed and dismissed where the State failed to prove beyond a reasonable doubt that Mr. Rose intended to commit a crime against a person or property in a house? Assignment of Error 1.

2. The Sixth Amendment of the United States Constitution guarantees a defendant in a criminal case the right to effective assistance

of counsel at trial, and defense counsel is responsible for investigating the facts and law of the case. There is some evidence that Mr. Rose committed only the lesser included offense of attempted first degree criminal trespass, and this defense was consistent with his testimony, the physical evidence, and with defense counsel's arguments. A defendant is entitled to a lesser included instruction if the crime is legally a lesser crime than the charged offense and there is some evidence that only the lesser crime occurred. First degree criminal trespass is a lesser offense of residential burglary. Should this Court reverse the conviction for attempted residential burglary because defense counsel was ineffective in failing to request a lesser offense instruction for attempted first degree trespass? Assignments of Error 2 and 3.

3. Was defense counsel ineffective for failing to propose a jury instruction on voluntary intoxication where Mr. Rose's testimony was that he was intoxicated at the time of the alleged crime and where counsel failed to argue the defense that Mr. Rose was so intoxicated at the time of the alleged crime that he did not form the requisite intent to commit residential burglary? Assignments of Error 2 and 4.

C. STATEMENT OF THE CASE

Nicole Miller lived in a duplex in Tumwater, Thurston County,

Washington with her fifteen year old son. 6Report of Proceedings (RP)[1] at 13, 14, 31, 57. The duplex has a small backyard enclosed by a chain link fence and a latched gate. 6RP at 18, 20. There is a patio in the backyard and a sliding glass door leads to the patio. 6RP at 22. The fence separates the yard from another duplex located behind Miller's duplex. 6RP at 40. Ms. Miller's bedroom has a long window with sliding panes or panels on both ends. 6RP at 26. The window consists of three panes of glass; the middle part of the window does not open and there are screens covering the two sliding panels located at each end of the window. 6RP at 26.

Ms. Miller testified that at approximately 11:30 p.m. on Friday, July 19, 2014, she was at home watching a movie with her son in their living room. 6RP at 52. After the movie ended she went to her bedroom and changed for bed and turned off the lights. 6RP at 28, 29. After she got in bed she heard what she thought was someone walking on decorative landscape rocks in the backyard. 6RP at 28, 42. She looked toward the window but did not see anything. 6RP at 28. She heard the noise again and saw a shadow on the other side of the window walking away from it

[1] The record of proceedings is designated as follows: 1RP – August 5, 2014, January 21, 2015, August 12, 2015, August 17, 2015, September 2, 2015, (preliminary hearings and sentencing); 2RP – October 2, 2014 (preliminary hearing); 3RP – November 6, 2014 (pretrial hearing); 4RP – May 7, 2015 (pretrial hearing) 5RP – March 25, May 14, August 19, 2015 (pretrial hearings); 6RP – August 24, 2015, August 25, 2015 (jury trial); and 7RP – August 25, 2015 (verdict).

toward the backyard gate. 6RP at 29. She stated that it was hot and that the left hand side of the sliding window was open and that she put a box fan on the window sill to blow cool air into the room. 6RP at 29, 51. Ms. Miller said the window screen was still in place and the fan rested against the screen; and the window blinds were resting on the top of the fan housing. 6RP at 29, 30.

After she saw the shadow she pulled the fan out of the window latched the window, and closed the blinds. 6RP at 30. She told her son to turn off the television in the other room so she could see outside the house 6RPat 32 looking out, she saw someone standing in the backyard of the duplex located behind her house. 6RP at 32. She also looked out her sliding glass door and saw that the backyard gate was open outward. 6RP at 32. She went to her son's room and could see a man standing on the far side of the fence and then saw him walk around the back side of the duplex, light a cigarette, and then walk along the opposite side of the fence to the garage of the duplex behind her. 6RP at 34. Ms. Miller stated that she had watched him through an opening in the blinds in her kitchen window and then heard her son yelling that the man was in the backyard. 6RP at 35, 49.

Ms. Miler's son stated that he saw the man open the gate and come into their backyard. 6RP at 68. She got her cellphone and then she and her

son locked themselves in the bathroom while she called 911. 6RP at 35, 69. She stated that she could hear "squeaking' and thumping noises from her bedroom window. 6RP at 36.

Police arrived and found Dustin Rose in the Miller's backyard. 6RP at 84. Mr. Rose was wearing a t-shirt, boxer shorts and flip flop sandals. 6RP at 88, 91. He was placed under arrest and subsequently transported to the hospital after passing out. 6RP at 85-87, 97, 123.

In the backyard, police found a screen that had been removed from the slider window and propped up against the side of the house. 6RP at 86, 87. The window screen was cut near the metal tab used for installation of the screen from the interior of the house. 6RP at 87. In the backyard police also found a multi-tool with a knife blade open and extended. 6RP at 86, 87.

Tumwater Police Officer Russell Mize stated that there was "a hand mark" on the middle, non-sliding section of the window facing the back yard, and "fingerprints on the sliding part of the window." 6RP at 87.

Mr. Rose testified that he was extremely intoxicated when he was arrested, and after being arrested he blacked out and woke up in the hospital. 6RP at 123. He stated that he started drinking that day at 10:30 p.m. 6RP at 124. He stated that he three shots of Jägermeister, three

Mirror Pond Ales and three Sierra Nevada Torpedoes in the two hours prior to the incident. 6RP at 123. He stated that he drank the alcohol because of a pain in his hip. 6RP at 124. At approximately 11:45 p.m. he decided to go to bed, but then got up and went to the back door because he was sick. 6RP at 125. He stated that he did not know Ms. Miller, but that two days earlier a Gatorade bottle was throw from the Miller's side of the fence into his yard, which hit his sliding glass door. 6RP at 126. He stated that on July 19, he walked outside the house to smoke a cigarette 6RP at 128 and while outside he found a second Gatorade bottle and candy bar wrappers which had not been there earlier in the day. 6RP at 128. He said he saw someone in the Miller house talking on a cell phone and said "excuse me" loudly three times. 6RP at 129, 130. He did not receive an answer, so he walked toward the front door of the Miller duplex, but saw that the gate to the backyard was open and so he went in the backyard to talk with Ms. Miller about the litter. 6RP at 131. He was barefoot and stepped on something, and so he returned to his house to put on sandals then went outside, smoked a cigarette, and then now one of the neighbors waved at him. 6RP at 131. He had made noise when he threw away the Gatorade bottle, so he walked halfway back to tell the neighbor what the noise was. 6RP at 132. He said that he knocked on a window in the Miller's backyard three times. 6RP at 133. He knocked on the right

hand sliding portion of the window through the wire screen, but did not receive an answer, so he decided to leave a note between the screen and the window so that it would not blow away. 6RP at 134. He tried to remove the screen to leave a note, but was not able to removed it so he walked away. 6RP at 134. As he left he stubbed his toe on the multi-tool later found by police. 6RP at 134. He stated that the multi-tool did not belong to him, and was located near the crawl space behind the house. 6RP at 135. He picked up the multi-tool to use to move the screen enough to wedge the note behind it, but fell and the screen fell off the side of the house. 6RP at 136. He stated that when he knocked on the window he fell against the center, non-sliding section of the window and touched the glass with his hand as he stumbled. 6RP at 133,137. He testified that the tag visible at the bottom of the blind in Exhibit 13, was on the middle window pane. 6RP at 143.

Ms. Miller stated that she did not own the multi-tool found by police in her backyard, and that she had not seen it in her backyard earlier that day. 6RP at 154. Mr. Rose said that he had seen maintenance men or gardeners working in the Miller's yard when he moved into the duplex a few days prior to the incident. 6RP at 160.

Mr. Rose was charged with attempted residential burglary, contrary to RCW 9A.28.020, 9A.52.025(1). Clerk's Papers (CP) 6. The burglary

theory was that Mr. Rose had taken a substantial step toward entering the Miller house with the intent to commit a crime therein. CP 6. Which crime he intended to commit therein was not specified. 6RP at 177.

Mr. Rose's counsel did not propose any jury instructions. 6RP at 151. No lesser included instructions were given. CP 44-45.

Mr. Rose was convicted as charged and the court imposed a standard range sentence of eight months to be served in the Thurston County Jail. 1RP (9/2/15) at 22; CP 37, 66.

Timely notice of appeal was filed on September 2, 2015. CP 52. This appeal follows.

D. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. ROSE INTENDED TO COMMIT ATTEMPTED RESIDENTIAL BURGLARY.

a. The State bears the burden of proving all essential elements of an offense beyond a reasonable doubt.

Dustin Rose was convicted of attempted residential burglary. In order to find Mr. Rose guilty, the jury had to find: (1) that Mr. Rose took a substantial step toward the commission of residential burglary, (2) that he intended to commit residential burglary. The crime of residential burglary is committed when a person enters or remains unlawfully in a dwelling with the intent to commit a crime against a

person or property therein.

The State has the burden of proving each element of the crime charged beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cronin,* 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in Article I, Section 3 of the Washington Constitution [2] and the Fourteenth Amendment to the federal constitution. *Sandstrom v. Montana,* 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *State v. Acosta,* 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

When an innocent explanation is as equally valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. *United States v. Bautista- Avila*, 6 F.3d 1360, 1363 (9th Cir. 1993). "[U]nder these circumstances, a reasonable jury must

[2]Art. I, section 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

necessarily entertain a reasonable doubt." *United States v. Lopez,* 74 F.3d 575, 577 (5th Cir. 1996). Speculation and conjecture are not a valid basis for upholding a jury's guilty verdict. *State v. Prestegard*, 108 Wn. App. 14, 42-43, 28 P.3d 817 (2001).

c. The State did not prove Mr. Rose had the intent to commit a crime against a person or property within the dwelling.

To establish an attempted residential burglary, the State was required to prove that Mr. Rose had taken a substantial step toward entering or remaining unlawfully in a dwelling; and that he intended to commit a crime against a person or property therein. RCW 9A.52.025(1); *State v. Stinton,* 121 Wn. App. 569, 573, 89 P.3d 717 (2004).

Here, since Mr. Rose was never inside the dwelling in this case, the State could not prove unlawful entry. When there is no unlawful entry into a dwelling, the State may not rely on an inference of unlawful intent, and must prove the intent to commit a crime beyond a reasonable doubt. *County Court of Ulster County v. Allen,* 442 U.S. 140, 167, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); *State v. Brunson*, 128 Wn.2d 98, 107-08, 905 P.2d 346 (1995). The finder of fact must look at all of the circumstances surrounding the act in determining whether the inference applies. *State v. Bergeron*, 105 Wn.2d 1, 19-20, 711 P.2d 1000 (1985). The court may not infer intent to commit a crime from evidence that is "patently equivocal." State v.

Jackson, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989) (holding that even where defendant broke a window, inference is equally consistent with two different interpretations - attempted burglary or malicious mischief); but see *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (holding inference to be appropriate in situation where facts were unequivocal, including defendant who admitted to prying lock off restaurant door at 3:30 a.m.).

Here there is not sufficient evidence to prove Mr. Rose intended to commit residential burglary. There was no entry into the residence by Mr. Rose, so the State was required to prove the inference beyond a reasonable doubt. Yet, the inference of his intent to commit a crime was not supported. It is uncontested that Mr. Rose was not inside the residence. Moreover it was also clear that nothing was stolen or removed from the property. The hand smear was found on the window was on the center non-sliding section of the window and therefore no indication of trying to slide or open the window to gain entry. 6RP at 133,143. Mr. Rose testified that he drunkenly stumbled and fell against the window, leaving the hand smear in Exhibits 8 and 10. 6RP at 133, 143. He stated that he knocked on the sliding section of the window covered by the screen in order to get the attention of the person he had previously seen inside the house. 6RP at 133. As a consequence, the evidence of Mr. Rose's intent was patently

equivocal, particularly in light of his intoxication, and the State failed to prove his intent to commit a crime within the dwelling.

c. The prosecution's failure to prove all essential elements requires reversal.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. *Jackson,* 443 U.S. at 319; *Green,* 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an essential element. *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *reversed on other grounds, Alabama v. Smith,* 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

The State failed to prove beyond a reasonable doubt that Mr. Rose intended to commit a crime within the dwelling where he was arrested, an essential element of the charged offense. Absent proof of every essential element, the conviction must be reversed and the charge dismissed. *State v. Hundley,* 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE A JURY INSTRUCTION FOR ATTEMPTED FIRST DEGREE TRESPASS WHERE MR. ROSE'S DEFENSE WAS THAT HE WAS LEAVING A NOTE ON THE WINDOW, AND WAS INEFFECTIVE FOR FAILING TO PROPOSED AN INSTRUCTION ON VOLUNTARY INTOXICATION

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Art. I, § 22 of the Washington Constitution provides, "In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel." Wash. Const. Article I, § 22.

The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*,) 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). It is "one of the most fundamental and cherished rights guaranteed by the Constitution." *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). To prevail on a claim of ineffective assistance, an appellant must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient

performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668; see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006). There is a strong presumption of adequate performance; however, this presumption is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d 130.

a. Defense counsel was ineffective by failing to offer an instruction for attempted first degree trespass

A defendant is entitled to a lesser included offense instruction if the proposed instruction meets the legal and factual "prongs" of the *Workman* test. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The legal prong is met where each of the elements of the lesser offense are included within the elements of the greater offense, while the factual prong is met where the evidence supports an inference that only the lesser offense was committed. *Id.* On review of the factual prong, a court examines the evidence in the light most favorable to the party seeking the instruction. See *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). A defendant is entitled to a lesser included offense instruction when (1) each of the elements of the lesser included offense is

a necessary element of the charged offense, and (2) the evidence supports an inference that the lesser crime was committed. *Fernandez-Medina*, 141 Wn.2d at 454 (citing *State v. Workman*, 90 Wn.2d at 447-48.

There must be some evidence showing that the defendant committed only the lesser included offense to the exclusion of the greater charged offense. *Fernandez-Medina*, 141 Wn.2d at 456. Although affirmative evidence must support the issuance of the instruction, such evidence need not be produced by the defendant. Rather, the trial court "must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given." *Id.*

An attorney's failure to seek instructions for an offense with lower penalties can deprive an accused of the effective assistance of counsel. *Pittman*, 134 Wn. App. at 383. Counsel's failure to request appropriate instructions constitutes ineffective assistance if: (1) there is a significant difference in the penalty between the greater and the lesser included offense; (2) the defense strategy would be the same for both crimes; and (3) sole reliance on the defense strategy in hopes of an outright acquittal is risky. *Pittman, supra.*

In *Pittman*, the defendant was charged with attempted residential burglary. At trial, his attorney failed to request the lesser-included instruction of attempted trespass. The Court of Appeals Division One

reversed his conviction, finding that defense counsel's failure to request the instruction constituted ineffective assistance:

> [C]ounsel's failure to request a lesser included offense instruction left Pittman in [a] tenuous position ... One of the elements of the offense charged was in doubt--his intent to commit a crime inside [the] home--but he was plainly guilty of some offense. Under the circumstances, the jury likely resolved its doubts in favor of conviction of the greater offense....His entire defense was that he never intended to commit a crime once he was inside [the] home. This was a risky defense [because] he clearly committed a crime similar to the one charged but the jury had no option other than to convict or acquit.
>
> *Pittman*, 134 Wn. App. at 388.

In this case, defense counsel's failure to request instructions on first degree criminal trespass denied Mr. Rose the effective assistance of counsel. Residential burglary, as charged, is committed when a person enters or remains unlawfully in a dwelling other than a vehicle with intent to commit a crime against a person or property therein. RCW 9A.52.025(1). First degree criminal trespass is committed when a person knowingly enters or remains unlawfully in a building. RCW 9A.52.070(1). Any person acting with intent also acts knowingly. RCW 9A.08.010(2). The definition of "building" includes any dwelling. RCW 9A.52.030(1). Accordingly, the only difference between first degree criminal trespass and residential burglary is that latter requires the additional element of intent to commit a crime inside the dwelling. All of

the elements of first degree criminal trespass are therefore included within the crime of residential burglary, and the former is a lesser included offense of the latter. *State v. Brunson*, 128 Wn.2d 98, 102, 905 P.2d 346 (1995); see also *State v. Soto*, 45 Wn. App. 839, 840-41, 727 P.2d 999 (1986) (first degree trespass is a lesser offense included within second degree burglary); *State v. Mounsey*, 31 Wn. App. 511, 517-18, 643 P.2d 892, review denied, 97 Wn.2d 1028 (1982) (first degree criminal trespass is a lesser offense included within first degree burglary).

The same is true of attempted first degree criminal trespass and attempted residential burglary. A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, the person does any act that is a substantial step toward the commission of that specific crime. RCW 9A.28.020. In the case of attempted residential burglary, a person is guilty if, with intent to commit residential burglary, the person takes a substantial step toward committing residential burglary, i.e. entering or remaining unlawfully in a dwelling with intent to commit a crime. In the case of attempted first degree criminal trespass, a person is guilty if, with intent to commit first degree criminal trespass, the person takes a substantial step toward committing criminal trespass, i.e. entering or remaining unlawfully in a building, which includes a dwelling. Again, the elements are exactly the same, except that residential burglary requires the

additional element of intent to commit a crime inside the dwelling. It is not possible to take a substantial step toward committing residential burglary (entering or remaining unlawfully with intent to commit a crime) without also taking a substantial step toward committing first degree criminal trespass (entering or remaining unlawfully). Attempted first degree criminal trespass is therefore a lesser included offense of attempted residential burglary.

Here, there was evidence that only a criminal trespass occurred. Mr. Rose, who had moved into the duplex behind Ms. Miller's duplex three to four days prior to the incident, he found litter in his backyard that he thought was thrown by someone in the Miller household.6RP at 126. He had been drinking heavily for approximately two hours prior to the incident, and went into the Miller backyard in order to leave a note at the back of the house between the glass and screen of the window located at the back of the house. 6RP at 123-33. He had instead knocked on the screened portion of the window but did not receive a response, he fell against the window and left a hand smear on the non-sliding, stationary part of the window. 6RP at 133,143. He cut a slit in the screen to open the screen wide enough to insert a note, but knocked the screen off the side of the house. 6RP at 136. The State did not present evidence that he attempted to enter the house or open the sliding part of the window.

As in *Pittman*, an all-or-nothing strategy exposed Mr. Rose to greater jeopardy than if his attorney had offered attempted first degree criminal trespass as an alternative. Residential burglary is a class B felony. RCW 9A.52.025(2). Mr. Rose faced 4.5 to 9 months in jail if convicted of residential burglary. CP 63-70. By contrast, first degree criminal trespass is a gross misdemeanor with a maximum penalty of a year in jail. RCW 9A.36.041(2), RCW 9A.20.021(2). However, as Mr. Rose had no adult criminal history, he very likely would have been sentenced to something far less. The burglary was an all-or-nothing verdict with a standard range of 4.5 to 9 months. As in *Pittman*, Mr. Rose's defense—that he had no intent to commit a crime at Miller's house and did not attempt to enter the house in any way but instead merely wanted to leave a note—was the same for both the criminal trespass and the burglary. As such, the first degree criminal trespass would not require an inconsistent strategy with the burglary. Thus, there was no cost to Mr. Rose in submitting appropriate criminal trespass instructions as a lesser included offense.

Had the criminal trespass been offered to the jury, it was possible that they could have found guilt only on that charge. Given the conflicting evidence between Mr. Rose, Ms. Miller, and Officer Mize, it is not unusual that the jury, "with no option other than to convict or acquit," would choose conviction, even if they had doubts about whether Mr. Rose

took a substantial step toward entering the Miller house with the intent to commit a crime therein. *Pittman*, 134 Wn. App. at 389.

An "all or nothing" strategy was unreasonable. Mr. Rose was denied the effective assistance of counsel by his attorney's failure to request instructions on first degree criminal trespass.

Mr. Rose was prejudiced by his attorney's failure to offer instructions on criminal trespass. Both prongs of the *Strickland* test are met, and Mr. Rose was denied the effective assistance of counsel. *Pittman, supra.* Therefore, Mr. Rose's conviction must be reversed and the case remanded for a new trial.

b. Defense counsel was ineffective for failing to propose a jury instruction on voluntary intoxication

RCW 9A.16.090 states:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state.

Although diminished capacity from intoxication is not an absolute defense, "the proper way to deal with the issue is to instruct the jury that it may consider evidence of the defendant's intoxication in deciding whether the defendant acted with the requisite mental state." *State v. Coates*, 107 Wn.2d

882, 891-92, 735 P.2d 64 (1987) (citing WPIC 18.10).

A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is evidence that the drinking affected the defendant's ability to form the requisite intent or mental state. *State v. Gallegos,* 65 Wn. App. 230, 238, 828 P.2d 37 (1992). In other words, the evidence "must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level culpability to commit the crime charged." *State v. Gabryschak,* 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996).

In order to support a voluntary intoxication instruction, the evidence must show the effects of the alcohol:

> Intoxication is not an all-or-nothing proposition. A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious. Somewhere between these two extremes of intoxication is a point on the scale at which a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state.

Gabryschak, 83 Wn app. at 254.

In this case, there was evidence that Mr. Rose, started drinking at approximately 10:30 p.m., and had been drinking for two hours prior to the incident, and was in fact extremely intoxicated at the time of the alleged crime. 6RP at 122-23, 143. Intent is an element, both of residential burglary

and attempted residential burglary. Therefore, Mr. Rose was entitled to an instruction on voluntary intoxication so that the jury could properly consider whether Mr. Rose's intoxication affected his ability to form the requisite intent.

However, Mr. Rose's attorney never requested an instruction on voluntary intoxication—or any instructions at all. Mr. Rose's attorney was ineffective for failing to request an instruction that was a Mr. Rose's defense.

As noted supra, to prevail regarding a claim of ineffective assistance, the defendant must show that his attorney was "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that the errors were so serious as to deprive him of a fair trial. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467,487, 965 P.2d 593 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984)).The first element is met by showing counsel's conduct fell below an objective standard of reasonableness. See, e.g., *Pirtle*, 136 Wn.2d at 487. Here, intent was the focus of the defense. Mr. Rose admitted he was present in the Miller backyard and acknowledged that he slit the window screen, knocked the screen off the window, knocked on the sliding part of the rear window, and fell against the stationary section of the window. 6RP at 134,136. Defense counsel, however, unquestionably

botched Mr. Rose's defense by failing to propose an instruction for voluntary intoxication and by failing to argue that he was severely intoxicated and therefore could not form the intent to commit burglary.

Although the State may have disputed Mr. Rose's level of intoxication through the observations of the arresting officers, there was still substantial evidence through Mr. Rose's testimony—and his illogical, almost inexplicable actions—to support an intoxication instruction. There is no need for expert testimony on intoxication to support an instruction. See *State v. Smissaert*, 41 Wn. App. 813, 815, 706 P.2d 647 (1985); *State v. Kruger*, 116 Wn. App. 685, 693, 67 P.3d1147(2003). "A defendant is entitled to have his or her theory of the case submitted to the jury under appropriate instructions when the theory is supported by substantial evidence." *State v. Finley*, 97 Wn. App. 129, 134, 982 P.2d 681 (1999). Because that was the case here, if Mr. Rose's trial counsel had submitted a voluntary intoxication instruction and been rejected by the court, that would have been reversible error. See *State v. Rice*, 102 Wn.2d 120, 683 P.2d 199 (1984); *State v. Hackett*, 64 Wn. App. 780, 786, 827 P.2d 1013 (1992). Therefore, counsel should have requested the voluntary intoxication instruction in this case.

The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the

case would have been different. *Pirtle*, 136 Wn.2d at 487 (citing *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992)).

Here, the jury was instructed on the elements of the crime, including intent. Although Mr. Rose's intoxication "was brought to the jury's attention, it 'was not instructed that intoxication could be considered in determining whether the defendant acted with the mental state essential to commit the crime'" of attempted residential burglary. *State v. Kruger*, 116 Wn. App. 685, 694, 67 P.3d 1147 (2003) (citing *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984)).

In *Kruger*, Division Three held it was ineffective assistance of counsel for defense counsel to fail to request a voluntary intoxication instruction where there was evidence from which the jury could have inferred that the defendant's intoxication prevented him from forming the requisite intent. *Kruger*, 116 Wn.App. at 694-95. The Court held that even where there is testimony given to the jury regarding intoxication, without the instruction, "the jury was not correctly apprised of the law, and defendants' attorneys were unable to effectively argue their theory of an intoxication defense." *Kruger*, 116 Wn.App. at 694. Without the instruction, the court held, "the defense was impotent." *Kruger*, 116 Wn.App. at 695.

The same is true here; voluntary intoxication was a defense that should have been dawned on even the most casual of litigators. Without a

jury instruction explaining that intoxication can be considered in determining whether the defendant acted with the requisite intent to commit residential burglary, the "defense was impotent." Therefore, it cannot be said that the absence of this instruction on a crucial issue of the case would not have made a difference to the result.

It was ineffective assistance of counsel to fail to request an instruction on voluntary intoxication and therefore the conviction must be reversed.

E. CONCLUSION

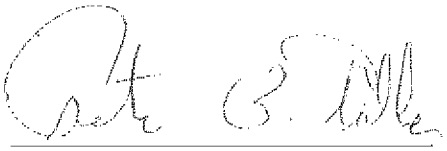
Mr. Rose's conviction for attempted residential burglary must be reversed because he was deprived of effective assistance of counsel when his attorney failed to request an instruction on voluntary intoxication, that would have told the jury that intoxication can affect a person's intent to commit a crime. Mr. Rose was also deprived effective assistance of counsel when his attorney failed to request an instruction for attempted first degree criminal trespass.

Further, there was not sufficient evidence to prove beyond a reasonable doubt that Mr. Rose possessed an intent to commit residential burglary. These reasons require the reversal of Mr. Rose's conviction.

DATED: March 29, 2016.

Respectfully submitted,

THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on March 29, 2016, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 29, 2016.

PETER B. TILLER

APPENDIX A

RCW 9A.52.025
Residential burglary.

(1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.
(2) Residential burglary is a class B felony. In establishing sentencing guidelines and disposition standards, residential burglary is to be considered a more serious offense than second degree burglary.

RCW 9A.52.070
Criminal trespass in the first degree.

(1) A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building.
(2) Criminal trespass in the first degree is a gross misdemeanor.

TILLER LAW OFFICE

March 29, 2016 - 4:22 PM

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